Supreme Court, U.S.
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No. 99-1062

In The

Supreme Court of the United States

THE STATE OF ARIZONA,

Petitioner,

v.

FRANCISCO F. LEYVA and SYLVIA LEYVA, husband and wife,

Respondents.

On Petition For A Writ Of Certiorari To The Arizona Court Of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

Petitioner is the State of Arizona. The State of Arizona was the plaintiff in the trial court and the appellant in the court of appeals.

Respondents are Francisco F. Leyva and Sylvia Leyva, husband and wife, who were defendants in the trial court and appellees in the Court of Appeals.

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STATEMENT OF THE CASE

A. Material Facts

Although the Somoza enterprise was a large drug organization engaged in the importation, transportation, and sale of marijuana, Respondent Francisco Leyva was a small member of the enterprise between January 1987 and December 1989. Leyva's role in the enterprise was that of a "bag" man. Leyva did collect proceeds.

In 1989, at the conclusion of an investigation and court-ordered wiretap, agents conducted simultaneous searches, arrests, and seizures in Tucson, in the greater Phoenix area, and in Nogales, Arizona, the Leyvas' home town. Somoza, Leyva, and others were charged with racketeering and drug and money laundering offenses. In the companion criminal case, Leyva pled guilty to racketeering and money laundering offenses and was placed on probation by the sentencing Court.

B. Proceedings Below

The State initiated a civil forfeiture action against Francisco Leyva and his wife, among others, seeking **in personam** and **in rem** forfeiture judgments based on the conduct for which Leyva was indicated and placed on probation for. The State obtained a judgment of $20 million against members of the enterprise, which was entered against Leyva and his marital community in April, 1993. The Leyvas appealed, arguing that the judgment was precluded by the Double Jeopardy Clause and was excessive in violation of the Excessive Fines Clause. The court of appeals reversed on double jeopardy and excessive fines grounds and remanded the case for the

trial court to determine the appropriate sanction. *State of Arizona v. Leyva*, 909 P.2d 506 (Ariz. App. 1995) (*Leyva I*).

On remand, the Trial Court ruled on the excessive fines issue. On remand the court found that the legislative intent of A.R.S. § 13-2314 is remedial and that there was no evidence that the statute's purpose or effect is punitive, and the court concluded that any judgment greater than $50,000 would constitute punishment prohibited by the Excessive Fines Clause of the Eighth Amendment. In reducing the figure to $50,000, the trial court considered the nature of Mr. Leyva's personal culpability, as reflected by his role in the enterprise; the large number of people who participated in the enterprise; and the defendants' inability to pay determined by the defendants' present salary and income.

The court of appeals affirmed this judgment. *State v. Leyva*, 985 P.2d 498, 501-504 and reviewed the trial court's calculation of excessiveness for clear error. The Arizona Supreme Court denied the State's petition for review.

REASONS FOR DENYING THE WRIT

In *United States v. Bajakian*, 118 S.Ct. 2028, 141 L.Ed. 2d 314, 66 USLW 4514 (1988) the court held at page 5 as follows:

> "The Supreme Court, however has made clear that whether a forfeiture is 'excessive' is determined by comparing the amount of the forfeiture to the gravity of the offense and *not* by comparing the amount of the forfeiture to the amount of the owner's assets."

Although the Court now cannot look to the assets of a Defendant, it still must now look at the Defendant's individual liability in the crime committed. Whether we look at it either way, the in personam judgment ordered by the lower Court inappropriate.

It must be recalled that in 1991 Defendant Leyva pled guilty to two (2) felonies, conspiracy and illegally conducting an enterprise. This case was prosecuted by the Arizona Attorney General, the same agency prosecuting this appeal. Both of these offenses were probation available and Defendant *was* in fact placed on probation, which he has long since completed. Again, this goes back to *Bajakian, supra,* where the United States Supreme Court has held that the touchstone of the constitutional inquiry, such as the *one* herein, is proportionality. The amount of the forfeiture must bear some relationship to the gravity of the offense it is designed to punish. Again here we are attempting to punish a person who received probation and was never even sent to prison.

In *Bajakian,* the Supreme Court refers time and again to *United States v. Austin,* 509 U.S. 602 (1993) thereby advancing the principles it stands for.

It is interesting that Justice Scalia, in his concurring opinion in *Austin,* distinguished in rem from in personam forfeitures and stated that the latter are designed as "assessments, whether or in kind, to punish the property owners' *criminal conduct,*" while in rem forfeitures are designed as "confiscations of property rights based on improper use of the property, regardless of whether the owner has violated the law." 509 U.S. at 624. Again reference is being made to Defendant Leyva's involvement

which must be based upon his plea to two offenses for which he received probation.

In its decision at page 14 the Court of Appeals found that the parties apparently *agreed* that the correct test for excessiveness is the one set forth in the *United States of America v. Real Property Located in El Dorado County*, 59 F.3d 974 (9th Cir. 1994). A review of the record indicates this was the test set forth by both parties. As such, the State has waived its right to proceed further. It is unfair to inform the Trial Court what the law is, and the facts to be applied and then raise in a higher court, that the agreed upon test was inappropriate.

Although the Trial Court may not have utilized the correct test, as it is now, at the time it did. But, it reached the proper result even if for the now incorrect reasons. Again, taking everything the State has set forth in its vast Memorandums and Briefs the issue under the new interpretation of the Excessive Fines clause is whether the amount of the in personam judgment is proportionate to Defendant's role and the number of people in the Somoza organization. Further the Trial Court stated the amount requested by the State was not proportionate to Defendant Leyva's culpability, hence a factual determination.

Therefore even under *Bajakian* standards, as now requested by the State, the Trial Court did consider Defendant Leyva's role, what he pled to, and the probated sentence he received. Defendant Leyva was in reality a "bag man", he transported money for the higher ups.

CONCLUSION

If we follow the logic of the State, a person on the low end of the totem pole who one time drives a load of marijuana for a major organization, regardless of assets, would be responsible the same as the Kingpin owner/ leader making the huge profits. This does not make any sense.

Wherefore, it is respectfully requested this Petition for Review be denied.

DATED: February 22, 2000

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